

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

FILED BY CLERK

MAR -8 2007

COURT OF APPEALS  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2006-0395-PR
	)	DEPARTMENT B
v.	)	
	)	<u>MEMORANDUM DECISION</u>
KRISTOFER ROBIN BELL,	)	Not for Publication
	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

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PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20042254

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF GRANTED

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Kristofer R. Bell

Florence  
In Propria Persona

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B R A M M E R, Judge.

¶1 After a jury trial, petitioner Kristofer Robin Bell was convicted of two counts of robbery and one count of theft by control. The trial court found he had two historical prior felony convictions and sentenced Bell to concurrent, presumptive prison terms, the longest of which was 11.25 years. In this petition for review, Bell contends the trial court erred when it dismissed his notice of post-conviction relief for lack of jurisdiction on the ground that, at the time he filed the notice, his appeal to this court was pending. We review

the trial court's order dismissing the post-conviction proceeding for an abuse of discretion. *See State v. Rosales*, 205 Ariz. 86, ¶ 1, 66 P.3d 1263, 1264 (App. 2003) (reviewing for abuse of discretion trial court's summary dismissal of post-conviction proceeding "based solely on the notice of post-conviction relief, without appointing counsel and before any petition was filed"); *see also State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990) (trial court's decision to grant or deny post-conviction relief is reviewed by appellate court for an abuse of discretion). We agree with Bell.

¶2 Bell filed his notice of appeal from the convictions and sentences on December 30, 2004. While the appeal was pending, he filed a notice of post-conviction relief. In its September 19, 2006 minute entry, the trial court appears to have dismissed the notice, finding "[t]his Court is without jurisdiction to review the Notice of Post-Conviction Relief because the matter is presently under direct appeal and jurisdiction has not been revested with this Court." Bell filed a motion to vacate that order, but in its October 11, 2006 minute entry, the court reiterated its previous conclusion, stating, "Until the mandate in [Bell's] appeal has been issued by the appellate court, this Court is without jurisdiction to review the Notice of Post-Conviction Relief."

¶3 We filed our memorandum decision in the appeal in May 2006. *State v. Bell*, No. 2 CA-CR 2005-0004 (memorandum decision filed May 18, 2006). Our mandate issued on December 6, 2006. But while Bell's appeal was pending and before we issued our mandate, the trial court did have jurisdiction over the post-conviction proceeding Bell had commenced by filing the notice of post-conviction relief, in accordance with Rule 32.4, Ariz.

R. Crim. P., 17 A.R.S. Rule 31.11, Ariz. R. Crim. P., 17 A.R.S., expressly permits a trial court to proceed with a post-conviction proceeding when an appeal is pending. It provides that “[n]o new matter, other than a petition for post-conviction relief not precluded under Rule 32.2, may be filed in the trial court by any party to an appeal later than 15 days after the record on appeal has been filed.” Ariz. R. Crim. P. 31.11. Thus, although the trial court could not consider any issue raised in a petition for post-conviction relief that was “[r]aisable on direct appeal,” Rule 32.2(a)(1), it could address any other nonprecluded claims raised in the Rule 32 proceeding.

¶4 Because the trial court erred in assuming it lacked jurisdiction simply because Bell’s appeal was pending, it abused its discretion in dismissing the proceeding. *See State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006) (“An error of law committed in reaching a discretionary conclusion may . . . constitute an abuse of discretion.”). We therefore grant the petition for review, vacate the trial court’s September 19 and October 11, 2006 orders, and remand the case for further proceedings consistent with this decision.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge